

1 Mathew K. Higbee, Esq., SBN 11158
2 **HIGBEE & ASSOCIATES**
3 3110 W Cheyenne Ave, #200
4 North Las Vegas, NV 89032
(714) 617-8373
(714) 597-6729 facsimile
Email: mhigbee@higbeeassociates.com

5 Attorney for Plaintiff,
6 MICHAEL MOEBIUS

7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

9 MICHAEL MOEBIUS,

10 Plaintiff,

11 v.

12 TONY CARNEVALE; DESERT ART,
13 LLC d/b/a CARNEVALE GALLERY;
14 CAESARS ENTERTAINMENT, INC.; and
DOES 1 through 10 inclusive,

Defendants.

Case No. 2:21-cv-00970-ART-VCF

**RENEWED MOTION FOR
ENTRY OF DEFAULT**

15 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

16 PLEASE TAKE NOTICE that Plaintiff Michael Moebius hereby moves to for entry
17 of default against Defendant Tony Carnevale and Defendant Desert Art, LLC.

18 This Motion is based on this Notice of Motion, the attached memorandum of
19 points and authorities, and the pleadings, files and other materials that are on file with
20 the Court or may be presented.

21 Dated: August 28, 2023

Respectfully submitted,

22
23 /s/ Mathew K. Higbee
24 Mathew K. Higbee, Esq.,
25 Nevada Bar No. 11158
26 **HIGBEE & ASSOCIATES**
27 3110 W Cheyenne Ave, #200
28 North Las Vegas, NV 89032
(714) 617-8373
(714) 597-6729 facsimile
Attorney for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is an action for copyright infringement brought by artist Michael Moebius (“Moebius”) against Desert Art, LLC (“Desert Art”), its owner Tony Carnevale (“Carnevale”), as well as Caesars Entertainment, Inc. (“Caesars”).

Moebius is the creator of an image of Audrey Hepburn blowing bubble-gum bubbles (“Hepburn Work”). Complaint ¶13. Defendants Desert Art and Carnevale own and operate Carnevale Gallery, which was located on property owned by Caesars, with Caesars receiving a portion of Carnevale Gallery’s sales as compensation in exchange for providing the gallery space. *See generally* Complaint ¶¶16-21.

In 2017 Moebius entered into a consignment agreement with Carnevale Gallery which terminated in 2018. Complaint ¶¶22-24. After the consignment agreement was terminated, Moebius was assured that Carnevale Gallery would cease selling Moebius’ artwork. Complaint ¶25.

In late 2019, a fan of Moebius sent him a photograph showing a counterfeit version of the Hepburn Work being displayed and offered for sale at the Carnevale Gallery. Complaint ¶30. Prior to filing suit, Moebius made numerous unsuccessful attempts to resolve the matter. Complaint ¶35.

A. Procedural Background

At the inception of the case, Defendants Carnevale and Desert Art have been represented by Attorneys Sagar Raich and Brian Schneider of Raich Law, PLLC. On October 4, 2022, Raich and Schneider moved to withdraw as attorneys of record for Carnevale and Desert Art, LLC. Dkt. #39. No party opposed the Motion. On October 17, 2022, the Court Ordered an in person hearing on the Motion and Ordered Carnevale and a representative from Desert Art, LLC to appear in person at the hearing. Dkt. #40.

On October 25, 2022, a hearing was held in front of the Honorable Magistrate

1 Cam Ferenbach, with Defendant Tony Carnevale appearing on behalf of himself and
2 Desert Art, LLC. Dkt. #43. At the hearing, Magistrate Judge Ferenbach granted the
3 Motion to Withdraw, ordered Carnevale and Desert Art, LLC to retain new counsel
4 no later than December 12, 2022, and also ordered that pending discovery requests
5 served on Defendants Carnevale and Desert Art, LLC be answered no later than
6 January 11, 2023. *Ibid.*

7 Having not retained counsel or responded to the pending discovery requests
8 by the court ordered deadline, Moebius moved for entry of default against Defendants
9 Carnevale and Desert Art, LLC on January 13, 2023. Dkt. #50. On January 18, 2023,
10 Magistrate Judge Ferenbach held a status conference. Dkt. #52. At the status
11 conference, Magistrate Judge Ferenbach denied, without prejudice, Moebius' motion
12 and granted Defendants Carnevale and Desert Art, LLC until February 17, 2023, to
13 retain new counsel. *Ibid.*

14 On February 17, 2023, Jarrod L. Rickard, new counsel for Defendants
15 Carnevale and Desert Art, LLC made an appearance. Dkt. #53. On June 30, 2023,
16 attorney Rickard moved to withdraw as counsel for Defendants Carnevale and Desert
17 Art, LLC. Dkt. #56. On July 24, 2023, Magistrate Judge Ferenbach granted the
18 motion to withdraw and set a deadline of August 23, 2023 for Defendants Carnevale
19 and Desert Art, LLC to retain new counsel. Dkt. #61.

20 As of the date of this Motion, Defendants Carnevale and Desert Art, LLC have
21 not retained new counsel.

22 **II. ENTRY OF DEFAULT IS AN APPROPRIATE REMEDY**

23 Federal Rule of Civil Procedure 55(a) provides that “when a party against
24 whom a judgment for affirmative relief is sought has failed to plead *or otherwise*
25 *defend*, and that failure is shown by affidavit or otherwise, the clerk must enter the
26 party’s default.” (emphasis added). When a party is ordered to retain counsel, but
27 fails to do so, entry of default pursuant to Rule 55 is the proper remedy. *See*
28 *FarmaSea Health, LLC v. Me. Coast Sea Vegetables, Inc.*, 2012 U.S. Dist. LEXIS

1 192402, at *6-7 (D. Ariz. Feb. 7, 2012) (“The Plaintiff has failed to comply with the
2 Court’s Orders of August 26, 2011 and November 18, 2011 directing the Plaintiff to
3 retain counsel. There is no indication that the Plaintiff is defending against the
4 Counterclaim.”); *see also Leviton Mfg. Co. v. Fastmac Performance Upgrades, Inc.*,
5 2013 U.S. Dist. LEXIS 129986, at *5 (S.D.N.Y. July 8, 2013) (“A corporate
6 defendant’s failure to comply with a court’s order that the defendant obtain counsel
7 constitutes failure to ‘otherwise defend’ for the purpose of Rule 55(a) such that an
8 entry of default is justified.”).

9 Here, Magistrate Judge Ferenbach ordered Carnevale and Desert Art, LLC to
10 retain new counsel no later than August 23, 2023. Dkt. #61. Defendants Carnevale
11 and Desert Art, LLC, had actual knowledge of these orders because they were present
12 at the hearing. *Ibid.* Despite that, Defendants Carnevale and Desert Art, LLC, have
13 not retained new counsel. The failure by Defendants Carnevale and Desert Art, LLC
14 to comply with Magistrate Ferenbach’s order represents a failure to defend the action
15 and represents a second time during these proceedings that they have failed to retain
16 counsel by the court ordered deadline.

17 As such, the Court should direct the clerk to enter default against Defendants
18 Tony Carnevale and Desert Art, LLC pursuant to Federal Rules of Civil Procedure
19 55. A copy of this Motion and the accompanying declaration have been served by
20 mail to the address listed on the Nevada Secretary of State website for Desert Art,
21 LLC, and Tony Carnevale. Higbee Decl. ¶ 5.

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1 **III. CONCLUSION**

2 In conclusion, Plaintiff Michael Moebius requests that the Court direct the
3 clerk to enter default against Defendants Tony Carnevale and Desert Art, LLC
4 pursuant to Federal Rules of Civil Procedure 55.

5
6 Dated: August 28, 2023

Respectfully submitted,

7 **/s/ Mathew K. Higbee**
8 Mathew K. Higbee, Esq.,
9 Nevada Bar No. 11158
10 **HIGBEE & ASSOCIATES**
11 3110 W Cheyenne Ave, #200
12 North Las Vegas, NV 89032
13 (714) 617-8373
14 (714) 597-6729 facsimile
15 *Attorney for Plaintiff*
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PROOF OF SERVICE

I, the undersigned, say:

I am over the age of 18 and not a party to the within action My business address is 1504 Brookhollow Drive, Suite 112, Santa Ana, CA 92705.

On August 28, 2023, I caused to be served the foregoing documents:

MOTION FOR ENTRY OF DEFAULT; DECLARATION OF MATHEW K. HIGBEE

on the following parties in this action by placing a true copy thereof enclosed in a sealed envelope as follows:

Desert Art, LLC
c/o Tony Carnevale
3500 Las Vegas Blvd. South,
Suite R-10, Las Vegas, NV, 89109

I certify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on August 28, 2023, at Santa Ana, California.

/s/ Diana Ramirez
Diana Ramirez

1 Mathew K. Higbee, Esq., SBN 11158
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**DECLARATION OF MATHEW
K. HIGBEE**

DECLARATION OF MATHEW K. HIGBEE

I, Mathew K. Higbee, declare as follows:

1. I am over the age of 18 years old. I am an attorney at law admitted to practice in the District of Nevada. I have personal knowledge of all matters stated herein, and if called as a witness, I could and would competently testify thereto.

2. I am the attorney for Plaintiff Michael Moebius in this matter.

3. On July 24, 2023, the Honorable Magistrate Judge Cam Ferenbach granted Defendants Tony Carnevale and Desert Art, LLC's Motion to Withdraw, ordered Carnevale and Desert Art, LLC to retain new counsel no later than August 23, 2023.

4. As of the date of this Declaration, Defendants Carnevale and Desert Art, LLC have not retained new counsel as ordered by Magistrate Judge Ferenbach.

5. I have caused a copy of this Motion and Declaration to be served by mail to the address listed on the Nevada Secretary of State website for Desert Art, LLC, and Tony Carnevale.

I certify under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on August 28, 2023, at Las Vegas, Nevada.



Mathew K. Higbee

Mathew K. Higbee, Esq., SBN 11158
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North Las Vegas, NV 89032
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Attorney for Plaintiff,
MICHAEL MOEBIUS

**UNITED STATES DISTRICT COURT
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~~[PROPOSED]~~ ORDER

~~[PROPOSED]~~ ORDER

Having considered the Motion of Plaintiff Michael Moebius to enter default
against Defendants Desert Art, LLC and Tony Carnevale,

IT IS HEREBY ORDERED as follows:

(1) The Motion is GRANTED, IN PART

(2) The clerk is directed to enter default against Defendants Desert Art, LLC,
~~and Tony Carnevale.~~ only.

10-24-2023

DATED:



Cam Ferenbach
United States Magistrate Judge